Office-Supreme Court, U.S.
FILED
AUG 9 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-2034

In The

# Supreme Court of the United States

October Term, 1983

UNITED STATES DEPARTMENT OF JUSTICE,
*Petitioner,*

vs.

EVELYN FALKOWSKI,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN D. GRAD
HIRSCHKOP & GRAD, P.C.
108 North Columbus Street
Post Office Box 1226
Alexandria, Virginia 22313
(703) 836-6595

OWEN PERRY
3290 West Big Beaver Road
Suite 510
Troy, Michigan 48084

COUNSEL FOR RESPONDENT

OF COUNSEL:

MARGARET BELLER
927 15th Street, N.W.
Washington, D.C. 20005

EVELYN FALKOWSKI
2401 E Street, N.W.
Washington, D.C. 20507

HERBERT R. RUBENSTEIN
1015 20th Street, N.W.
Washington, D.C. 20036

EDWARD OWEN FALKOWSKI
Post Office Box 18
Fayetteville, TN 37334

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

## QUESTIONS PRESENTED

1. Whether an arbitrary and capricious decision of the Department of Justice not to provide legal representation for a federal employee who is sued in her official, as well as individual, capacities by a subordinate for actions undertaken on the job is absolutely unreviewable under the Administrative Procedure Act, §§701-706.

2. If the Department's decision is not immune from review, whether the factual analysis by the Court of Appeals was proper.

## PARTIES TO THE PROCEEDING

The Petitioner is the United States Department of Justice and Evelyn Falkowski is the only Respondent. The Equal Employment Opportunity Commission, a defendant/appellee below, does not seek review of any portion of the Opinion of the Court of Appeals affecting the Commission.

## TABLE OF CONTENTS


| | Pages |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Statutes and Regulations Involved | 2 |
| Statement | 2 |
| Reasons for Not Granting the Petition | 11 |
| Conclusion | 17 |
| Appendix A | APP 1 |
| Appendix B | APP 13 |
| Appendix C | APP 16 |
| Appendix D | APP 18 |
| Appendix E | APP 20 |


## TABLE OF AUTHORITIES

CASES:


*Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967) ..... 15

*Bob Jones University v. United States*, — U.S. —, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983) ..... 16

*Chaney v. Heckler*, 718 F.2d 1174 (D.C. Cir. 1983), *reh'g denied* 724 F.2d 1030 (1984), petition for *cert. granted* (No. 83-1878), 52 U.S.L.W. 3902 (U.S. June 19, 1984) ..... 15

*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971) ..... 14, 15

*Dunlop v. Bachowski*, 421 U.S. 560, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975) ..... 15

*Falkowski v. EEOC*, 719 F.2d 470 (D.C. Cir. 1983) ..... 1

*Falkowski v. Perry*, 464 F.Supp. 1016 (N.D. Ala. 1978), *vacated* 599 F.2d 1051 (5th Cir. 1979) ..... 5, 6

TABLE OF AUTHORITIES—Continued

Pages

*Falkowski v. Powell,* No. 73-P-1009-S (N.D. Ala. 9/9/74) ..... 3

*Green v. McElroy,* 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959) ..... 15

*Hishon v. King and Spalding,* — U.S. —, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984) ..... 16

*I.N.S. v. Chadha,* — U.S. —, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983) ..... 15

*McLaughlin v. State of Florida,* 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964) ..... 16

*Natural Resources Defense Council, Inc. v. S.E.C.,* 606 F.2d 1031 (D.C. Cir. 1979) ..... 14, 15

*Perry v. Falkowski,* No. CV78-PT-0935-S (N.D. Ala. 7/22/81), *aff'd,* No. 81-7643 (11th Cir. 10/25/82, *cert denied,* No. 82-1914 10/3/83) ..... 5, 7, 10, 12

*Perry v. Golub,* 400 F.Supp. 409 (N.D. Ala. 1975), *aff'd and vacated* 594 F.2d 862 (5th Cir. 1979) ..... 5, 6, 7, 10, 16

*Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) ..... 17

*United States v. Nixon,* 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) ..... 16

*University of Texas v. Camensich,* 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981) ..... 12

*Wood v. Georgia,* 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981) ..... 12

CONSTITUTION, STATUTES AND REGULATIONS:

Administrative Procedure Act, 5 U.S.C. § 551 ..... 2, 14

Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000 ..... 2, 14, 16

TABLE OF AUTHORITIES—Continued


| | Pages |
|---|---|
| 18 U.S.C. §§2511(c) and (d) | 7 |
| 28 U.S.C. §§516, 517 and 519 | 2 |
| 28 U.S.C. §1254(1) | 2 |
| 28 C.F.R. §§50.15 and 50.16 | 2, 14 |

No. 83-2034

In The

# Supreme Court of the United States

October Term, 1983

UNITED STATES DEPARTMENT OF JUSTICE,
*Petitioner,*

vs.

EVELYN FALKOWSKI,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Evelyn Falkowski, by counsel, opposes the Petition for a Writ of Certiorari filed on behalf of the United States to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

## OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 719 F.2d 470. The Opinion on denial of rehearing is not yet reported. The Opinion of the District Court is unreported. These Opinions have been reprinted by the United States in an Appendix attached to its Petition, and references, unless hereinafter noted, will be to the Appendix attached to the Petition for a Writ of Certiorari.

## JURISDICTION

This Court has jurisdiction, should it choose to exercise same, pursuant to 28 U.S.C. §1254(1).

———o———

## STATUTES AND REGULATIONS INVOLVED

Relevant provisions of the Administrative Procedure Act (APA), 5 U.S.C. §551, *et seq.*, as well as the statutes (28 U.S.C. §§516, 517, 519) and regulations (28 C.F.R. §§50.15, 50.16) that govern the provision of government legal representation for federal employees are reprinted in the Appendix attached to the government's Petition. This litigation also involves Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000, *et seq.*

———o———

## STATEMENT

Respondent Evelyn Falkowski began her career with the EEOC in Birmingham, Alabama in 1967, and by 1971 had become head of the Commission's newly formed office in Jackson, Mississippi. At the time, she was one of the few women professionals employed by EEOC in its Southeastern Region.

After two years, she sought return to openings in the Birmingham District Office for both personal and professional reasons. When her attempts to transfer failed, she brought suit against the EEOC alleging unequal treatment based on sex and race, and a pattern of sex discrimination in EEOC's Southeastern Region. See EF APP

1-12.[1] The matter was settled in apparently amicable fashion in the fall of 1974 when the Commission agreed to appoint Ms. Falkowski Director of the Birmingham Office. See, *Falkowski v. Powell* No. 73-P-1009-S (N.D. Ala. 9/9/74).

She was respected for opposing job segregation and vigorous enforcement of Title VII in Mississippi at the time she returned to Birmingham. The Mississippi office won an award for performance during her four year tenure. EF APP 13.

When Ms. Falkowski arrived at Birmingham, the incumbent Deputy Director, Bertram Perry, had been charged with insubordinate and abusive conduct by her predecessor. EF APP 2-3. Ms. Falkowski, who suffered the same sort of abuse as her predecessor, reported Perry's insubordination and behavior, which was oppressive to employees, black and white. DOJ 4a.

In July of 1975, her superior's response to a proposal that disciplinary charges be issued her Deputy was to publicly remove her authority without warning, hearing or advance charges. Then, while she was thus stigmatized, EEOC attempted to transfer both Ms. Falkowski and Mr. Perry from their jobs without due process. EF APP 1-12, DOJ 4a.

To stop her summary transfer, she went to Court and sought a contempt hearing in connection with her consent

---

[1]Appendix references "EF APP #" refer to pages attached as Respondent Evelyn Falkowski's Appendix. These are reproduced from the Appendix for the Court of Appeals. References to the government's Appendix, attached to its Petition, are by "DOJ #a."

settlement ten months earlier. Ms. Falkowski alleged, and was prepared to prove, that the true reason her superior did not permit her disciplinary charges to be issued to Perry was because of his prejudice for Perry, who was of his same race and sex, and his residual bitterness over the Title VII litigation which preceded her return, over his objection, to Birmingham. EF APP 1-12.

Mr. Perry opposed his transfer by suing three EEOC officials, Alvin Golub, Donald Hollowell and Evelyn Falkowski, in their *official* capacities.

Hearings for both Mr. Perry and Ms. Falkowski were scheduled on short notice for the same day in different courtrooms in the United States District Court in Birmingham, Alabama.

This set the stage for the one and only time that EEOC has ever allegedly "represented" Ms. Falkowski in any of the ensuing litigation.[2] EEOC attorneys planned the defense of Perry's suit *only* with her co-defendants. They did not call her to the stand at the preliminary hearing even to rebut Bertram Perry's accusations against her (which her superior, a co-defendant, had acted upon without due process). The result was, essentially, an *ex parte* hearing by Bertram Perry, wherein he painted himself as a whistle blower and falsely accused Ms. Falkowski. Her immediate superior, who was called to the stand by EEOC attorneys, had to admit under cross-examination withdrawing her authority. EEOC lawyers had been unprepared to defend Falkowski when Perry accused her in the pre-

---

[2]The Circuit Court below characterized this "representation" as "highly improper" because of the obvious conflict of interest. See Note 14 at DOJ 17a.

liminary hearing in *Perry v. Golub* because they had talked only to her co-defendants who had taken action adverse to her interests.[3] EEOC, though "representing" Ms. Falkowski, took the position at the preliminary injunction hearing that the matter involved a personality clash (which Falkowski denies), and Mr. Perry won a preliminary injunction against his transfer.

Though the accusations against her were rebutted administratively and by means of discovery which Ms. Falkowski conducted during the next year at her own expense, the *Perry* suit over Ms. Falkowski's objection was mooted without a trial on the merits after EEOC dropped its plan to transfer Perry and Falkowski. The United States Court of Appeals for the Fifth Circuit affirmed the finding of mootness, but vacated the underlying proceedings so as to spawn no consequences. EF APP 20.

Though there has never been a trial on the merits of any issues below, Ms. Falkowski's reputation has nevertheless been sullied by the *ex parte* findings, which quote implied charges from her superior, *e.g. Perry v. Golub,* 400 F.Supp. 409 (N.D. Ala. 1975). Not published is that she refuted them administratively. EF APP 1-12. The District Court compounded the untrue published record and renewed the stigmatizing findings in a now void 1978 opinion,[4] subsequent to deciding, without a trial, that the

---

[3]The government has frequently taken the position that Evelyn Falkowski, who was present with private counsel, could have testified. In fact, her lawyer was there to represent her in her case against EEOC and no one ever defended her—or offered her testimony—to rebut Perry in Perry's suit.

[4]*Perry v. Golub* and *Falkowski v. Perry,* 464 F.Supp. 1016 (N.D. Ala. 1978), vacated (5th Cir. 1979). Respondent has on

(Continued on next page)

case was moot and again renewed them in a fee award after they were vacated (EF APP 20, DOJ 6a) by the Fifth Circuit.

Officials acting for the government continue to rely on vacated findings and non-binding *obiter dictum* adverse to Ms. Falkowski, ignore proof they have which no trial has enabled her to present, and deny her a hearing. In its Petition, the government relies upon these findings, as well.

Ms. Falkowski prevailed in her case in stopping her transfer. Several months later, she finally had to sue to regain her authority from EEOC. Immediately, EEOC restored it. After she again prevailed, her 1976 suit, by then consolidated with Perry's 1975 suit (*Perry v. Golub*), was deemed moot by the Alabama District Court at the same time Perry's was.

For the next two years, EEOC turned a deaf ear to Falkowski's pleas for management support and, in violation of EEOC Order 571, failed to process grievances in which she sought a non-discriminatory work environment. Perry, with a "preliminary injunction," saw a green light to become even more abusive to her and others. EF APP 18.

---

(Continued from previous page)

two occasions unsuccessfully sought a Writ of Certiorari from this Court to redress the difficulties caused her by the continually cited and relied upon vacated decisions. All judicial decisions involving Evelyn Falkowski as a party were appended to these prior Petitions, Nos. 79-1244 and 82-1914.

The defendant in *Falkowski v. Perry* is not Bertram Perry, her Deputy, but EEOC's agency head in 1975, Lowell Perry. A further possible confusion regarding the name Perry is that Ms. Falkowski's brother, Owen Perry, has since 1979 provided a substantial amount of her legal defense.

In July of 1977, after two years of desperation, Falkowski recorded a conversation she had with Perry regarding a warning letter.[5] The conversation commences with Bertram Perry stating to Falkowski, his boss:

> Now you had time to engage in this shit all day. You ugly white bitch. I ought to kick your ass. You stupid heifer. Well, you write another warning. This will be in your damn ass before it's over. This will be in your damn ass before it's over, you ugly bitch. . . .

Falkowski turned the tape over to her superiors as proof of her plight, DOJ 7a. They, in turn, claimed that the recording violated an EEOC regulation and tried to fire her. EEOC also sought to fire Mr. Perry, as well, *on the basis of the content of the tape recording,* DOJ 7a, DOJ 11a.

As a result, Mr. Perry reactivated his original litigation (*Perry v. Golub*) and again obtained an injunction against transfer (because EEOC used against him the recording it said Falkowski should not have made, and because of the *ex parte* record that EEOC never opposed in his mooted-without-trial suit). He also sued Ms. Falkowski again in 1978, this time because of the tape recording, and named EEOC Chair Eleanor Holmes Norton as a defendant "co-conspirator" (*Perry v. Falkowski*). Both were sued *officially* and individually, Falkowski for making the recording, Ms. Norton for using it, DOJ 8a, DOJ 9a. Ms. Falkowski was again denied legal representation

---

[5]Ms. Falkowski felt exemptions in privacy legislation (18 U.S.C. §§ 2511(c) and (d)) allowed tape recording of her conversation in self-defense as pre-emptive of the EEOC agency rule prohibiting secret tape recording of phone conversations.

from the government. Norton, on the other hand, was given counsel. EEOC eventually certified that respondent was not acting *ultra vires* in connection with tape recording her conversation to corroborate her prior reports of Perry's continual abuse.

This litigation concerns the attempt of Ms. Falkowski to get reimbursement and legal defense customarily provided by the government to government employees sued officially by subordinates, here withheld for impermissible reasons and contrary to the policies and interests of the government.

Plaintiff's claim below emphasized two causes of action. First, plaintiff contended that the entire pattern of lack of support for her by EEOC from 1975 on, including failure to provide legal defense or attorney's fees in connection with the Bertram Perry suits, was a result of discrimination and retaliation by EEOC, unlawful under Title VII, growing out of her efforts to enforce the consent decree she had won in earlier litigation, and as a result of her efforts to reopen that case to cure retaliation. The second claim was that the Justice Department acted arbitrarily, capriciously and contrary to law in denying Ms. Falkowski a legal defense and in the way it reached its decision to do so.

The record was developed that at no stage of the proceedings did Evelyn Falkowski have input to the Department of Justice or any of its agencies concerning her version of the events, and that she has been denied any meaningful access to or participation in the decision concerning her defense.

Respondent alleged that the Department of Justice procedurally and substantively acted arbitrarily and ca-

priciously, and sought review under the Administrative Procedure Act.

The District Court, Smith, J., disposed of the case upon summary judgment in the three page Memorandum reprinted at DOJ 28a. Judge Smith, while finding that plaintiff had stated appropriate causes of action under Title VII and the Administrative Procedure Act, granted summary judgment for the defendants. In doing so, he accepted on their face the reasons articulated by the Justice Department for not providing a defense.[6]

An appeal was filed by Respondent Falkowski to the United States Court of Appeals for the District of Columbia. The government did not cross-appeal Judge Smith's conclusion that causes of action were stated.

The Court of Appeals, in a twenty-seven page Opinion containing numerous findings of fact, reversed. In the view of the unanimous Panel, "The issue before us in this appeal is whether the District Court moved too quickly in granting summary judgment because genuine issues of material fact remain in the case," DOJ 16a.

Finding that the government did not meet its burden of resolving all relevant factual legal issues in its own favor upon a motion (and making short shrift of the patently ridiculous reasons offered), the Court of Appeals remanded for fact-finding with respect to the Title VII

---

[6]Judge Smith also dismissed the Title VII claim on the ground that EEOC recommended that the Department of Justice provide a defense. The Court of Appeals, examining the dilatory tactics of EEOC in the matter, reached a different inference and reversed. This aspect of the case is not being appealed by the government.

and APA causes of action as applicable to representation in the second Perry lawsuit, *Perry v. Falkowski.*[7] With regard to Ms. Falkowski's cause of action under the APA, the Court concluded generally:

> Moreover, the evidence suggests that DOJ may have accorded Ms. Falkowski disparate treatment under its existing regulations and practice. The rationality of the Department's decision therefore cannot be determined without further factual inquiry, and we accordingly hold that summary judgment as to this final cause of action was inappropriate. DOJ 21a. [Footnote omitted]

The Court then embarked upon a lengthy analysis of the reasons cited by the Department of Justice for not providing a defense to Ms. Falkowski, finding all of them wanting. DOJ 22a, *et seq.* The Court also relied upon material in the record, including the Report of the Staff of the Subcommittee on Administrative Practice and Procedure of the Senate Committee of the Judiciary, containing DOJ policy in representing government employees in litigation. DOJ 25a. Neither that material, nor at oral

---

[7]The Court dismissed a claim for a defense with respect to the first Perry lawsuit, *Perry v. Golub,* on the grounds that the question of representation in that case had already been litigated in the United States Court of Appeals for the Fifth Circuit.

With respect to the Title VII cause of action against the EEOC, the Court stated, "it is certainly a reasonable inference that EEOC was wilfully dragging its feet because it did not wish government representation to be approved at all, or at least not in time to meet the Perry complaint. . . . Because the government failed to dispel these obvious inferences of illegal motivation and resulting harm that arise from the Commission's dilatory handling of Ms. Falkowski's request, we conclude that genuine issues of material fact remain with respect to her second cause of action." See DOJ 20a-21a.

argument, nor at any time, has the government been able to produce any evidence whatsoever showing that an employee sued in his or her official capacity has been denied representation by government supplied or financed counsel.

In defending its judgment on appeal before the Court of Appeals, the government marshalled no less than nine major arguments, including numerous subparts. Many of these arguments were technical and picky. One of these arguments, almost as an afterthought, was the proposition that the decision to provide or not provide legal help for an employee is not reviewable under the APA. The Court of Appeals disposed of this argument at Note 16, DOJ 21a, which has now become the gravamen of the government's complaint and the basis for this Petition. The government's suggestion for rehearing *en banc* was denied by an eight to three vote but produced the dissent of Judge Starr reprinted at DOJ 35a.

———o———

## REASONS FOR NOT GRANTING THE PETITION

### 1. The Petition has misstated the facts and misframed the question.

#### "Personal Feud"

The government insists on calling the underlying facts in this case a "personal feud" between Ms. Falkowski and her then Deputy. The differences between Ms. Falkowski and Mr. Perry grew out of a government employment relationship; there was no other relationship. Mr. Perry was admittedly insubordinate and racist. When Ms. Fal-

kowski became his supervisor, he was already under warning, yet Respondent's superiors sided with Perry and disapproved or rescinded any discipline she attempted. Although Evelyn Falkowski and Eleanor Holmes Norton, then Chairperson of EEOC, were both sued officially and personally for essentially the same reasons in 1978 in *Perry v. Falkowski*, Ms. Norton received representation and Ms. Falkowski did not.

To support its repetitive assertion that this is a "personal feud," the government ignores that Evelyn Falkowski had to resist abusive conduct and relies improperly on decisions which have been vacated by the Fifth Circuit so as to spawn no consequences.[8] These decisions were vacated, in part, because, as the Court of Appeals below stated, "the Fifth Circuit evidently felt it unfair to leave these preliminary findings on the record absent the opportunity for a full hearing on the merits." DOJ 6a.

The difficulty in all of this litigation is that Evelyn Falkowski has never been accorded either an informal or an adversary hearing on the issues. She has *yet* to be able to defend herself on these often repeated charges or to present an argument as to being defended. Nevertheless, the government uses bits and pieces of prior litigation, though vacated, and which it knows has been vacated. It ignores proof favorable to her in a discovery record she has not yet been able to use in a trial and claims, without

---

[8]Even were they not vacated, they would still be nonbinding, as they were produced only from a preliminary injunction hearing. *University of Texas v. Camensich*, 451 U.S. 390 (1981). Further, the Court did not take into account the conflict of interest of the only counsel entering an appearance for Ms. Falkowski. See, *Wood v. Georgia*, 450 U.S. 261 (1981).

citation, support from an "unusually detailed" "public record." Petition at Page 21.

**Misframed Question**

The government has also misframed the question. Evelyn Falkowski was sued *officially* as well as individually. EF APP 16. She is most certainly one of the few persons in history sued as an official of the United States (and thus as an arm of the United States) not defended by the government. The question, as stated by the government in the Petition, concerns a suit against a federal employee in her "personal" capacity. This framing of the question overlooks the fact that Evelyn Falkowski was sued in her official capacity also, and further, that EEOC certified that Ms. Falkowski was not acting *ultra vires*. It is the position of Respondent that a case based upon a misframed question and a misquoted record should not be reviewed by this Court.

**2. The decision of the Court of Appeals with respect to applicability of the APA is correct.**

The government seeks unreviewable discretion with respect to the provision of counsel to its employees. It claims that freedom by arguing that the decision to provide representation to an employee is wholly committed to agency discretion and thus exempt from review.[9] The government also takes the Court of Appeals to task for its analysis of the problem at Note 16, DOJ 21a.

---

[9]The government also appears to complain, Petition at Page 21, that review of this type decision will invade the attorney/client privilege. The privilege, however, if present, belongs to the client or potential client, such as Evelyn Falkowski. It is her privilege to waive, not that of prospective government lawyers, and she may do so in APA litigation.

We believe that this Court settled that argument in *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971) at 410. As this Court stated in *Overton Park,* the "agency discretion" exception to APA review is very narrow and only applies in those cases where, essentially, there are no standards and thus nothing against which to measure an administrative decision.

In this case, there are statutory, constitutional and regulatory standards. Perusal of 28 C.F.R. 50.15,[10] DOJ 40a, *et seq.,* establishes that the government must determine whether the employee who is seeking representation was acting within the scope of authority, and must perform full fact-finding so as to determine the interests of the United States. In the Falkowski case, the disregard for the requirements of Title VII and the Constitution, the lack of government fact-finding, the refusal to hear Ms. Falkowski, and the patently ridiculous reasons advanced for not providing defense counsel all show that the decision not to provide Ms. Falkowski a defense involved impermissible considerations and was arbitrary and capricious.

The Justice Department clearly has a bone to pick with the United States Court of Appeals for the District of Columbia Circuit. In essence, the government does not like *Natural Resources Defense Council, Inc. v. S.E.C.,* 606 F.2d 1031 (D.C. Cir. 1979). That case provides a three part test for determining the scope of judicial review of certain agency decisions. In view of *Overton Park,* it can hardly be argued that the government has broad, unreview-

---

[10]These regulations existed in essentially the same form at the time of the relevant events. Court of Appeals Opinion at Note 13, DOJ 14a.

able powers; rather, the government seems to be upset that the D.C. Circuit has supposedly adopted a pragmatic test rather than one that relies heavily on legislative history. That issue is being vigorously pressed by the government in *Chaney v. Heckler,* No. 83-1878, litigation concerning the FDA role in approving use of lethal injections in death penalty cases, in which this Court recently granted a Writ of Certiorari, *Id.,* 52 U.S.L.W. 3902 (U.S. June 19, 1984). Irrespective of *Chaney* and the applicability of *Natural Resources,* in *this* matter the Court of Appeals was clearly correct. Also, this is not a *Chadha* type issue of executive prerogative, *I.N.S. v. Chadha,* — U.S. —, 103 S.Ct. 2764 (1983), but involves deprivation of due process clearly subject to check by judicial action. See, *e.g., Green v. McElroy,* 360 U.S. 474 (1959). The government does not urge the Court to overrule *Overton Park.*[11] Since *Overton Park* so clearly controls—and supports—the Court of Appeals ruling in this case, we fail to understand what all the excitement is about. Indeed, it almost appears as if the government is stretching for any vehicle it can find to redress its differences with the D.C. Circuit over the reach of the APA. This case, however, clearly is the wrong vehicle.

This is a case where the issue is whether an agency decision to single someone out for discriminatory treatment arguably based on race, sex and other impermissible factors is subject to judicial review. Discriminatory treatment based on race and sex is contrary to public policy,

---

[11]Nor does *Overton Park* stand alone on this point. See *Dunlop v. Bachowski,* 421 U.S. 560 (1975) (review of decision of Secretary of Labor not to sue to invalidate a union election); *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967).

*Bob Jones University v. United States,* — U.S. —, 103 S.Ct. 2017 (1983), *McLaughlin v. State of Florida,* 379 U.S. 184 (1964), *Hishon v. King and Spalding,* — U.S. —, 104 S.Ct. 2229, 81 L.E.2d 59 (1984), and not to be tolerated merely because the government alleges it to be "discretionary." See *United States v. Nixon,* 418 U.S. 683 (1974).

**3. The factual analysis of the Court of Appeals was correct.**

Plaintiff alleged a clearly arbitrary and capricious decision by the Justice Department. Objective external data supports this conclusion (the government is unable to provide any indication of any government employee sued in an official capacity by a subordinate who has not been defended by the government); the government's own descriptions of its policy, which are, indeed, in the record in this case, show that government employees have *always* been defended, DOJ 24a-25a; and the reasons given for turning down Ms. Falkowski are impermissible, not "rational," do not "withstand scrutiny," and are not "satisfactory." DOJ 23a-24a.

The first reason advanced by the Department of Justice for not representing Ms. Falkowski was the "clearly personal nature of the dispute between Ms. Falkowski and Mr. Perry." As the Court of Appeals found, government counsel represent "federal officials as defendants in quite acrimonious Title VII actions on a regular basis." DOJ 23a. The *Perry v. Golub* litigation had its origins in a Title VII claim by Bertram Perry. The second reason given was the tape recording by Ms. Falkowski which was, from EEOC's point of view, in contravention of an EEOC directive. The Court of Appeals dismissed this reason, as well, noting that the government has defended numerous

persons under criminal investigation by the Department of Justice and has hired private counsel to do so in cases of conflict of interest. The third reason, which the Court found "the least satisfactory of all" was the existence of litigation by Ms. Falkowski herself against the government. The Court of Appeals found that the proposition that federal officers become ineligible for government-provided legal defense because they, themselves, have challenged earlier personnel actions, is "an impermissible burden on the rights granted federal workers by Congress and the Constitution." DOJ 24a. See, *Sherbert v. Verner*, 374 U.S. 398 (1963).

---

## CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JOHN D. GRAD
HIRSCHKOP & GRAD, P.C.
108 North Columbus Street
Post Office Box 1226
Alexandria, VA 22313
(703) 836-6595

OWEN PERRY
3290 W. Big Beaver Road
Suite 510
Troy, Michigan 48084

COUNSEL FOR
RESPONDENT

Of Counsel:

MARGARET BELLER
927 15th Street, N.W.
Washington, D.C. 20005

EVELYN FALKOWSKI
2401 E Street, N.W.
Washington, D.C. 20507

HERBERT R. RUBENSTEIN
1015 20th Street, N.W.
Washington, D.C. 20036

EDWARD OWEN FALKOWSKI
Post Office Box 18
Fayetteville, TN 37334

August 1984

**APPENDIX A**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 81-1776
SMITH, J.

EVELYN FALKOWSKI,

*Plaintiff,*

v.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION ET AL.,

*Defendants.*

AFFIDAVIT OF EVELYN FALKOWSKI

I am Evelyn Falkowski, and I am the plaintiff in this action. I have read the memorandum to which this affidavit is attached, and hereby affirm that the memorandum and the foregoing is true to the best of my knowledge and belief:

EARLY CAREER IN CIVIL RIGHTS FIELD:

Since early adulthood I have worked against racial segregation, beginning in Georgia, where segregation was once enforced by law, and continuing through my college years (all completed at night) to the present time. Twice in the early sixties I paid for stands against white racism by anonymous bomb threats to my home in Alabama. Once was at the time of the "Anniston bus burning". In late 1967, after successful government service, I began my career with EEOC's new Alabama office and later opened EEOC's Mississippi Office. My first years with EEOC were happy and productive. See Exhibits A, B, and C.

PURSUIT OF A NON-DISCRIMINATORY WORK ENVIRONMENT:

The EEOC's Atlanta Region moved from predominantly white male in the upper ranks to predominantly black male. The strictures of equally filling positions through the civil service system eased because of new concepts of recruitment, qualification, and merit, as well they should have. For women in EEOC, however, unlike the case with black men, change was slow, especially in the South. During the first four years of existence of EEOC's Birmingham District Office, I was the only woman of approximately the first one hundred professional hires. In 1971, when I obtained a management position in the EEOC Jackson, Mississippi Office, which I opened, five similarly qualified men had turned the job down.

Later, I sought to return to Birmingham when the Jackson Office was functioning well, when there were vacancies, because of my husband's health. When nothing worked, including my offers to accept lateral or downward transfers, I finally filed a law suit. Many of the vacancies were not filled from within. When I filed the suit, all eight jobs at GS-13 or higher in EEOC's Birmingham District Office were held by men, and seven were black. Throughout the eight-office Atlanta Region, no woman other than myself had attained supervisory, much less management level. On the eve of trial, my suit was settled by what was said to be an "amicable agreement". Two months later I was District Director in Birmingham.

Unlike the Mississippi Office, the Birmingham Office had an admitted history of four years of internal strife, much of which centered around Bertram Perry, by then

the Deputy Director. Yet I believed he and I could work together and bring better feeling. His disruption and abuse was such that I had to change my mind and seek concurrence to issue disciplinary warnings, but the concurrence was withheld by my supervisor, the Atlanta Regional Director, like Perry, a black man. My predecessor, also black, had transferred and refused to sign an agreement to the effect that the same deputy would drop grievances against him, and he would drop proposed discipline. (Exhibit D). But my predecessor had no stigmatizing action taken against him when his transfer was arranged. As a white female, I was not to be so fortunate.

## EFFORTS TO STAY ON THE TEAM DURING 1975

Bertram Perry yelled criticisms about our superiors and subordinates from the beginning. He terrorized the staff. Subordinate supervisors unanimously complained that he was abusive. My attempts to counsel Perry met defiance. Then I asked for and obtained a conference with my supervisor in Atlanta. I carefully sought to enlist support. It was first granted, then withdrawn, and it was clear that my performance would be closely scrutinized. I communicated carefully and with patience.

## HISTORY OF ABUSE OF RIGHTS BY EEOC

It is ironic that after I checked the law regarding recording of my conversation (Excerpt, Exhibit E), EEOC and Justice abandoned me for allegedly violating EEOC Order 165. Many regulations and laws have been broken in violation of my rights, including, I believe, the Constitution, and these by EEOC. This forced my lawful action:

1. I was not permitted to discipline persons who defied authority.

2. While a recommendation for disciplinary charges against my deputy was pending, my authority as EEOC Birmingham District Director was removed without warning, hearing, or charges.
3. Grievances I filed were not acknowledged.
4. Discrimination complaints I filed were not processed.
5. When charges were finally issued against me they were not upheld, but my request for a written decision as provided by regulations was ignored, as was my attorney's written request.
6. My authority was not restored when the charges were dropped, until four or five months later, when I filed a new lawsuit.
7. Within two weeks after I filed suit, my authority was restored, but without any effort by the agency to restore my credibility with staff.
8. I was ordered to let supervisors hire their own staff, and could not moderate performance appraisals or overrule the deputy director on any personnel decision.
9. Grievances were generated against me and processed expeditiously. My grievances were ignored. Grievances were granted against me without my being heard.

On August 15, 1975, EEOC notified my deputy and me they had investigated and discovered problems, and we would be detailed and then transferred. I held the Birmingham location as a result of a consent order. He, because of a "second chance". My deputy sued me and our superiors, who had not accorded him a hearing as I had recommended. His complaint was served only on government counsel and I did not see it.—Resulting adverse findings have been used against me ever since, though the dis-

trict court has said it might have been different had I been heard or had there been a trial.

My calls for legal help were ignored. Meanwhile, believing Bertram Perry was entitled to preliminary relief on due process grounds, I set about to prevent my own transfer. I succeeded on August 29, 1975.

But that same day, my deputy won findings that he had exposed my misconduct and was a "whistle blower". EEOC managers above my level had evidence that my supervisor's accusations when he removed my authority were based on reports from Bertram Perry and were groundless. They protected my co-defendant and did not cross-examine Perry. Thus he prevailed. Government counsel gave me no chance to take the stand.

Later, EEOC did not support my motion for reconsideration. They did not respond to my request that they conduct discovery which would clear my name. (Exhibit F-1). They did not support my discovery. (F-2). They did not support an agreement whereby findings adverse to EEOC, including me, might have been withdrawn, and they did not suport my appeal which finally ended the district court's injunction preventing action against Bertram Perry for past misconduct, retained after the court decided without a trial that his case was moot. But now defendants contend that EEOC represented me; that our interests were not adverse.

EEOC's EEO Director found Bertram Perry to be a whistle blower based on the district court decision for him in 1975, wherein he won a preliminary injunction. After that, the district court made more findings favoring Perry, using as evidence that the EEO Director's findings in his

favor were rescinded by the agency. Now that decision has been vacated.

When my transfer was prevented after a hearing, EEOC agreed to withdraw the transfer order, and there were no findings. But for me, one decision in violation of due process feeds another. I continue to be found guilty of that which I have disproven. If I receive any help at all from civil libertarians in EEOC, the answer is, "it's moot".

In appealing a fee award to my former subordinate, the EEOC admits he was insubordinate, that supervisors testified he called me obscene names, countermanded orders, threatened and accused. EEOC then blames me equally for conflict. In opposing fees to me as a prevailing party, EEOC tells the Eleventh Circuit I was found guilty of "irregular" actions and physical assaults, based on hearsay, incredible, and inadmissible evidence, and despite no charges against me having been upheld on any grounds, and none having been brought against me at all for some of the alleged offenses.

## HISTORY OF ATTEMPTS TO RESOLVE TITLE VII COMPLAINTS ADMINISTRATIVELY

Charges I filed under Title VII against EEOC which were ostensibly settled by consent order in 1974, are not really resolved. I never cashed the check for $565. because when it was proffered, reprisals had started again. I was asked to waive past and future claims. (Ex.G).

My charges because of lack of management support in 1975 are still pending administratively.

The pending appeal of these 1975 charges was acknowledged by EEOC's Office of Appeals and Review by letter

dated November 6, 1981, with attachments which indicate that the EEO Office asked that the appeal be considered without reference to the underlying record, which comprises ten volumes. (Exhibits H-1 thru H-6).

By memo dated December 12, 1976, I amended charges filed July 9 and August 15, 1975, and dismissed without prejudice by the District Court, Northern District of Alabama, on November 30, 1976, to raise issues of continuing retaliation. (Exhibit I)

By letter dated October 16, 1980, EEOC acknowledged a number of EEO charges by me, excluding two not located pertaining to discriminatory lack of legal defense and discriminatory lack of discipline to a subordinate guilty of insubordination. (Exhibit J).

A charge filed by me by memo dated August 4, 1976, and a decision by the EEO Director dated June 7, 1977, reflects a pattern of response to allegations of reprisal which I never had opportunity to discuss with anyone above my immediate level in management. (Exhibits K-1 - K-2).

A charge filed by me under date of December 14, 1976, amends earlier charges dismissed by a court without prejudice, and raises issues including: "I tend to be blamed for an agency-acknowledged pattern of disruption and insubordination of one permitted equal or greater rank and credit and hearing." (Exhibit L).

A certified letter from me to then EEO Director Maxine Cade, dated June 15, 1977, documents that I asked for an evidentiary hearing following her proposed disposition of my July 9, 1975, discrimination complaint, as one option she suggested. I also made further efforts to communi-

cate, in the absence of other available channels. (Exhibit M). Hearing was scheduled. (Exhibit M-2). No hearing took place.

Under date of February 6, 1978, I filed a charge alleging new reprisals continuing from November 7, 1977, when EEOC sought court permission to fire me. On May 19, 1978, through a counselor, I requested an audience with headquarters superiors which never occurred. (Exhibit N-1 - N-2).

Under date of November 10, 1978, I filed an internal discrimination complaint because of EEOC's failure, within the past month, to provide legal defense customarily provided its officials when sued by subordinates. The unacknowledged complaint, sent by certified mail, concludes:

> EEOC's failure to defend me in Court in 1975 irreparably damaged my reputation and harmed the Agency (See Ex.A), and within the past month EEOC has ignored my request for legal defense though a law suit is pending against me for action I took in defense of the public, other employees, and myself, within a right provided by law to protect credibility in a conversation to which one is a party.
>
> EEOC has no true conflict of interest with me, because I support and work for its mission and lawful policies and have protested responsibly within machinery provided by law. EEOC's denial to me of access to legal counsel has prevented understanding and defeated its legal objectives.[1]
>
> [1]Although EEOC may pay legal fees in the future the divided front in presentation of the defense has unnecessarily complicated the defense of the lawsuit as well as placed a burden on me of having to advance counsel fees initially. (Exhibit O-1 - O-4.)

Records of Counselling contacts and other correspondence show that EEOC's position to the counselor was:

> "12/5/78—Interview with Nick Inzeo of the Legal Counsel Division; Headquarters. EEOC can not provide Legal Defense. Justice Dept. will handle."

Attempts to attain equal administration of discipline were equally futile. (Exhibits P-1 - P-5). As were all requests for audience.

In May 1981, I filed a new discrimination complaint because of EEOC's continuing unfairly to treat me as a wrongdoer, failing to help me clear my name, and failing to support me in seeking published decisions to show that prior decisions adverse to the agency, including to me, were vacated so as to spawn no consequences, and continuing to impute fault in me to the courts. On June 26, 1981, EEOC's EEO Director rejected the complaint. On August 13, 1981, the same person acknowledged its receipt without reference to the prior letter, and told me I would be advised later whether the charge was accepted or rejected. (Exhibits Q-1 through Q-6).

The foregoing do not comprise all discrimination complaints I filed, but reflect the general pattern. After my transfer to Washington in January 1979, the pattern of retaliation continued. The person who offered me the position in Washington, a Caucasian male, was according to my information and belief, himself forced out of his position within a few months, and his position was awarded to a black man. I was too intimidated to file charges about numerous retaliatory acts which occurred, and also too burdened with trying to pursue charges I filed six years ago, which I pursue primarily because of my faith and con-

viction that a more discrimination-free work environment can exist in this country.

## HISTORY OF ATTEMPTS TO COMMUNICATE WITH THE JUSTICE DEPARTMENT

For five years, I attempted to communicate the merits of my position with the Justice Department. I was, due to EEOC's interference and the actions of others in the Justice Department, ignored. To penetrate the barriers, I hired counsel last year whom I hoped would be able to cause implementation of the routine process of having the Justice Department arrange legal defense for an agency supervisor sued in official capacity by a subordinate. That the Justice Department afforded my former counsel a "hearing" (consisting of a conversation, essentially, at which I was not present) does not constitute a hearing to me. My former counsel did not know my answers to what they told him. His report includes the following items told him:

> "The fact that the EEOC had not requested that DOJ provide reimbursement was a big factor."
>
> "The U. S. Attorney in Birmingham has strongly urged the DOJ to stay out of the case, and not to provide representation. He has stated that the matter has been all over the newspapers."
>
> I violated EEOC Order 165, which prohibits my recording my conversation.
>
> Those responsible for the decision do not believe it is in the interest of the government to defend me.

## HISTORY OF ATTEMPTS TO COMMUNICATE WITH EEOC ATTORNEYS

When I read in a Birmingham newspaper, in 1975, that Bertram Perry had sued me, I was engaged in explaining

to counsel retained on short notice the situation regarding EEOC's attempt to transfer me from a location I had just won after a consent order. I hoped for an appropriate opportunity to communicate with EEOC counsel, and attempted to contact the Legal Counsel Division in EEOC headquarters regarding my defense from the Perry suit against me and other officials. I was told that Izzie Jenkins was no longer over Legal Counsel as she had been promoted. (Ms. Jenkins, formerly with the Justice Department, has since had supervisory authority over persons in the Legal Counsel Division). I was unsuccessful in reaching her successor, Ms. Connie Dupre. It was my understanding that the counsel I retained to represent me as a plaintiff would see that I was protected in Perry v. Golub. I did not understand that they did not consider this important at the preliminary hearing stage—in fact, when I realized the Perry hearing was ending without my being heard, I objected to my counsel, but it was too late. In the Perry hearing, the lead attorney was Mr. Joseph McCormack, representing EEOC defendants according to record of the hearing. He did not cross examine Mr. Perry. He did not call me to the stand. At an EEOC training session a year later, Mr. McCormack would not talk with me. Ms. Jenkins will not talk with me. Recently I have asked, not that EEOC assist me in gaining attorney's fees from my former deputy (Ex.R). I have asked that they assist in getting findings on the merits made in a fee award to him vacated, because such findings flout the opinions of the Fifth Circuit which affirmed mootness and vacated underlying proceedings so as to spawn no consequences. Instead, EEOC, which has repudiated the district court decisions as to Mr. Golub and Mr. Perry, has said they are supported as to me, and offered hearsay, inadmissible, and incredible evidence to prove it.

EVIDENCE OF PRETEXTUAL OR IMPERMISSIBLE DEFENSES

The Justice Department, in a staff report to Congress, listed numerous male federal officials sued for whom the department has provided or arranged legal defense. Yet the Justice Department finds it not to be in the interest of the government to defend the one woman who pioneered as a manager in EEOC's Southeastern Region, sometimes angering companies against whom she found reasonable cause to believe they discriminated. The Justice Department doesn't question why the subordinate who sued her received years of free legal support from an attorney who represented companies charged with discrimination before EEOC. The Justice Department doesn't examine the causes of her poor image, or have anyone hear her side of the story. It doesn't inform itself of the facts, and doesn't even accept documents from her.

In the same report the government defense of Richard Nixon, John Mitchell, and others charged with watergate crimes is noted. And a footnote points out:

> "The Department has always represented all government employees sued in their official capacities as mandated by its statutory responsibility under 28 U.S.C. § 516." (Exhibit S).

I swear that the foregoing statement, consisting of seven pages, is true to the best of my knowledge and belief, as is the memorandum to which it is attached.

/s/ Evelyn Falkowski

Subscribed and sworn to before me this 25th day of November, 1981, in Alexandria, Virginia.

/s/ Jennifer Ayers
Notary Public

My commisison expires March 26, 1985.

## APPENDIX B

AFFIDAVIT

STATE OF MISSISSIPPI
COUNTY OF HINDS

I, Michael Raff, hereby depose and give as my sworn statement:

(1) I am the Executive Director of the Mississippi Council on Human Relations, a private non-profit agency that functions throughout the State of Mississippi. The primary purpose of the Council is to initiate and support activities that assist Mississippians in obtaining and securing their basic human rights.

(2) It was in this capacity as Director of the Council that I first met Ms. Evelyn Falkowski in 1971. At that time she was serving as District Director of the Jackson District Office of the Equal Employment Opportunity Commission.

(3) My personal reaction to Ms. Falkowski from the very beginning has been very favorable. She has sensitive, warm personal concern for people both on and off the job. But it is to her professional competence that I can speak most authoritatively. Due to the nature of my work, I have had almost weekly contact with the Jackson District Office of the Equal Employment Opportunity Commission for the past three years. I have seen Ms. Falkowski build the Jackson District Office from one to over forty employees. I am impressed by the initiative she took in building a staff that in only a couple of years has made the Jackson District Office one of, if not the most, successful in the Region.

(4) In February, 1974, the Mississippi Council on Human Relations completed a four-month investigation of the hiring practices and patterns of state agencies. After studying 68 agencies, we found 44 had yet to hire their first Black person.

(5) After our investigation was made public, the Council was called upon by individuals to file charges with the Jackson District Office of the Equal Employment Opportunity Commission on behalf of persons claiming to be aggrieved by specific state agencies. The Council, as the third party, filed some charges against nine of the largest state agencies in Mississippi that were refusing to hire Black people.

(6) The assistance I received from Ms. Falkowski and her staff was outstanding. Due to the large number of aggrieved persons (Mississippi is 38% Black) she directed her staff to give our charges immediate attention. Determinations were made and negotiations were begun with these nine state agencies.

(7) After lengthy negotiations, a settlement was made with only one of the nine agencies. The EEOC office, under Ms. Falkowski's creative direction, worked endlessly attempting to get these agencies to sign a contract that they would hire Black people. The agencies refused. Consequently, lawsuits are being filed. During all this time, I have been very impressed with Ms. Falkowski's competence and strong interest into having Black people employed by state government.

(8) The success of the Jackson District Office of the Equal Employment Opportunity Commission rests

largely because of Ms. Falkowski and her ability to hire competent and industrious staff.

/s/ Michael Raff

Sworn to and subscribed before me on this the 22nd day of August, 1975.

/s/ illegible
Notary Public

My Commission Expires:

My Commission Expires August 30, 1978

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. CV-78-M-0935

BERTRAM N. PERRY,

*Plaintiff,*

vs.

EVELYN FALKOWSKI, individually and as Executive Director, Birmingham District Office, U. S. Equal Employment Opportunity Commission; ELEANOR HOLMES NORTON, as Chairman, U. S. Equal Employment Opportunity Community (sic); and X Y and Z whose names are unknown at present but will be named by amendment when ascertained,

*Defendants.*

### C O M P L A I N T

(Filed August 24, 1978)

Jurisdiction of this Court is invoked pursuant to 28 USC 1343 18 USC 2520. This is a civil action pursuant to 18 USC 2520 seeking actual and punitive damages for the unlawful acts of Defendants. Jurisdiction is also invoked to redress the deprivation of rights of Plaintiff protected by First, Fifth and Fourteenth Amendments to the Constitution of the United States. 42 USC §§ 1981, 1985 and 1986. This suit further seeks Declaratory and Injunctive relief pursuant to 28 USC §§ 2201, 2202 and 42 USC §2000-e et seq.

1. Plaintiff is a Negro resident citizen of Birmingham, Alabama and resides at 228 - 10th Avenue, S.W.

2. Plaintiff is an employee of the U. S. Equal Employment Opportunity Commission and serves as Deputy Director of the Birmingham District Office, of said commission.

3. Plaintiff avers that on or about November 7, 1977, the United States Equal Employment Opportunity Commission, hereinafter referred to as EEOC, filed a petition before the Hon. J. Foy Guin in case number 75-G-1476 Perry v. Golub, United States District Court for the Northern District of Alabama, Southern Division.

## APPENDIX D

CERTIFIED MAIL 441196

Robert Jeffrey, Sr., Regional Director, 9/29/78
ATRO

Evelyn Falkowski, Director,
BIDO

Supplemental or Amended Petition to be Filed in Court Stating Further Charges Against Bertram Perry

As you know, I have reported abusive and/or insubordinate conduct by Bertram Perry, Deputy Director, against me, and this has occurred very frequently since the court proceedings. The last hearing was in June. With regard to making known to the court further disciplinary problems with Bertram Perry, you promised to get back to me. To date, the court has not ruled on the original petition. Neither have additional grounds based on subsequent misconduct of Bertram Perry been made known to the Court by the agency.

The situation is such that almost always when I try to communicate with Perry he makes abusive remarks to me, when I note the remarks he harasses me while I am in process of noting the remarks, and then I have to give him written instructions and continue working with and through him in the face of his open defiance and angry yelling about me.

I hereby request that you arrange to have the legal counsel division contact me for information and documentation so that additional pleadings may be filed. Otherwise, I believe the agency will be derelict in not making known a situation that continues to be untenable for a federal agency to tolerate.

There appears to be no way to provide interim relief to me from Perry's harassment, short of detailing him out of the office. I now ask that misconduct subsequent to the initial petition be made known to the court. This is a reiteration of previous verbal requests. Further, I re-institute my grievances based on continuing defiance of direction by Perry, and I ask that effective steps to end this be tried by the agency filing new pleadings in court.

CC: Ms. Charlotte Frank, Director, Office of Field Services

**APPENDIX E**

DO NOT PUBLISH

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

No. 77-1719

---

BERTRAM N. PERRY,

*Plaintiff-Appellee,*

*v.*

ALVIN GOLUB, ET AL.,

*Defendants-Appellees,*

EVELYN FALKOWSKI,

*Movant-Appellant.*

---

No. 77-1865

---

EVELYN FALKOWSKI,

*Plaintiff-Appellant*
*Cross-Appellee.*

*v.*

LOWELL PERRY, Chairman, ETC., ET AL.,

*Defendants-Appellees*
*Cross-Appellants.*

---

Appeals from the United States District Court
for the Northern District of Alabama

---

(April 25, 1979)

Before WISDOM, CLARK and FAY, Circuit Judges.

PER CURIAM:

The district court correctly dismissed these actions without prejudice on account of mootness. The effect of such dismissals was to vacate all underlying proceedings in each case so as to spawn no consequences. The adjudi-

cation of mootness eliminated all pending controversies and left the court without jurisdiction to enter those portions of the injunction orders restricting future actions of the parties in either case. The orders of dismissal, without prejudice, are affirmed but the "protective orders" or injunctions are vacated.

AFFIRMED and VACATED.